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No. 97-066

In the Supreme Court of the United States

October Term, 1996

Maurice Rivers
and
Robert C. Davison,
Petitioners,

vs.

Roadway Express, Inc.,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should the Court reverse its decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and create an inflexible evidentiary framework of establishing a prima facie case in all discharge claims brought pursuant to the various anti-discrimination statutes?

2. In an action brought pursuant to 42 U.S.C. §1981 claiming retaliation as a result of an exercise of a contract right, must a plaintiff identify the contract right exercised in response to a defendant's motion for summary judgment?

LIST OF PARTIES

Respondent Roadway Express, Inc. is a Delaware Corporation. There are no parent or nonwholly owned subsidiary companies to be listed pursuant to Rule 29.6.

The parties are the petitioners, Maurice Rivers and Robert C. Davison ("Rivers" and "Davison" respectively when referred to individually, and "Petitioners" when Rivers and Davison are referred to jointly), and the respondent Roadway Express, Inc. ("Roadway").

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OPINIONS BELOW

All relevant opinions are included in the Appendix to the Petition.

JURISDICTIONAL STATEMENT

Petitioners pray for exercise of this Court's jurisdiction pursuant to 28 U.S.C. §1254(1) which permits review by writ of certiorari before or after rendition of a judgment or decree by a United States Court of Appeals. The Court should decline to exercise its jurisdiction. The Sixth Circuit's decision affirming the District Court's grant of summary judgment does not conflict with the decision of another United States court of appeals on the same important matter, nor does it decide an important federal question in a way that conflicts with relevant decisions of this Court or of a state court of last resort.

STATUTE INVOLVED

This case involves 42 U.S.C. §1981 ("§1981"), which provides, in relevant part:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

Petitioners were terminated from Roadway in 1986 under similar circumstances and sued Roadway claiming, *inter alia*, race discrimination under §1981 and under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e, *et seq.* (Petition at 2a.) On January 19, 1990, the district court determined that Petitioners failed to state claims under §1981. (Petition at 39a.) Petitioners' identical claims under Title VII were tried to the district court during a one week trial in the spring of 1990; Petitioners were unable to prove their claims. (Petition at 45a-55a.)

On appeal, the Sixth Circuit determined that Petitioners had sufficiently plead a claim under §1981, as that statute was interpreted by this Court in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). (Petition at 63a.) The Sixth Circuit remanded the case for further proceedings under §1981. (Petition at 69a.)

Petitioners successfully petitioned this Court for a writ of certiorari on the issue of the application of the Civil Rights Act of 1991 to this case. The Court held that the 1991 Act did not apply, and remanded the case for further proceedings. *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994).

On remand, the district court granted summary judgment in favor of Roadway, finding that Petitioners failed to establish a prima facie case of retaliation. (Petition at 11a-27a.) Petitioners

appealed the district court's grant of summary judgment to the Sixth Circuit. The Sixth Circuit affirmed the district court, finding that the Petitioners had not established a prima facie case of retaliation and, even if they had, Roadway had stated a legitimate, nondiscriminatory reason for Petitioners' terminations and Petitioners had not demonstrated that reason to be pretext. (Petition at 1a-10a.) Through this Petition, Petitioners seek review of that Sixth Circuit decision.

A brief summary of the facts of this case is warranted. Petitioners failed to attend disciplinary hearings scheduled for them on August 22, 1986. (Petition at 47a-48a.) Both were suspended for two days based on their individual work records. (*Id.*) Both grieved the two day suspensions. (Petition at 48a-49a.) Both argued that they had received insufficient notice of the hearings and, had they received sufficient notice, they would have attended. (Petition at 49a.) Both were awarded two days of back pay. (*Id.*)

Roadway notified Petitioners and the Union that new hearings would proceed within three days after the grievance awards were announced. (*Id.*) Hearings were scheduled for Petitioners and other employees while they were on duty. (*Id.* at 50a-52a.) Petitioners were ordered numerous times to attend their hearings. (*Id.*) Both refused. (*Id.*) Petitioners' hearings took place on September 26, 1986. (*Id.*) Both were terminated for their failure to obey

several direct orders and for their accumulated work records. (Petition at 52a.)

Three white employees were scheduled for hearings at the same time. One of these employees, like Petitioners, refused numerous direct orders to attend a hearing while on the clock and was terminated. (Petition at 51a-52a.) Another complied with orders to attend a hearing and was not terminated. (*Id.*) The third was not at work and on duty when his hearing was scheduled.

SUMMARY OF ARGUMENT

Both the district court and the court of appeals found the following evidentiary framework to be appropriate to establish a prima facie case based upon *McDonnell Douglas* and *Burdine*:[1]

1) plaintiff is a non-white;
2) plaintiff enforced or exercised a specific contract right;
3) plaintiff was subject to an adverse employment action; and
4) there is a causal link between both plaintiff's enforcement or exercise of the contract right and plaintiff's race.

(Petition 3a.)

Petitioners complain that they were found not to have raised a material fact concerning any racial motivation for their discharges and allege that it was solely due to their inability to present evidence of comparables who were treated differently. This is incorrect. The court of appeals specifically found that Petitioners failed not only to present evidence of any comparables but also that they failed to present any direct evidence of a racial motivation for Roadway's actions. (Petition 5a.) Petitioner's premise

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[1]*McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1972); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).*

that the Sixth Circuit is in conflict with other circuit courts as it requires proof of comparables is therefore incorrect. Petitioners are similarly incorrect to the extent they argue that *McDonnell Douglas* was not applied or was applied incorrectly.

There is no conflict between the Sixth Circuit and the other circuit courts of appeals in the application of the *McDonnell Douglas* construct. The variances noted by Petitioners are simply a reflection of the variations of facts and proof required in differing situations.

Even if Petitioners' premise was correct, this case involves the interpretation of a statute which requires unique analysis and unique proof, and which, due to the Civil Rights Act of 1991, has become an anachronism. It is not an appropriate vehicle through which to establish precedent regarding establishment of a prima facie case of discriminatory discharge.

Finally, Petitioners contention that they should not be required to identify the contract right upon which they base their claim is plausible in the context of notice pleading and perhaps in response to a motion to dismiss. It is not plausible, however, when faced with a motion for summary judgment as a non-moving party must set forth specific facts showing that there is a genuine issue for trial.

ARGUMENT

I. PETITIONERS' COMPLAINTS THAT THE SIXTH CIRCUIT MISAPPLIED THE *MCDONNELL DOUGLAS* FORMULA DO NOT WARRANT SUPREME COURT REVIEW.

This is not a case deserving this Court's review for a second time. It is now solely a retaliatory discharge claim brought pursuant to 42 U.S.C. §1981 and decided upon a motion for summary judgment. It involves the straight forward application of well established law.

The Sixth Circuit appropriately stated the evidentiary framework described in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), in its opinion granting summary judgment. (Petition at 3a.) Therefore, by definition, the alleged error must either be that the Sixth Circuit misapplied *McDonnell Douglas*, or that this Court should overrule *McDonnell Douglas* and create an inflexible method of establishing a prima facie case of employment discrimination in discharge cases. In the case of the former, this Court rarely grants certiorari to review a properly stated rule of law. Sup. Ct. R. 10. There is no reason to deviate from this practice in this case. In the case of the latter, Roadway submits that *McDonnell Douglas* requires no revision as it provides an appropriately flexible method of analyzing employment discrimination cases.

II. THE SIXTH CIRCUIT DOES NOT RIGIDLY APPLY THE *MCDONNELL DOUGLAS* FORMULA SO AS TO REQUIRE EVIDENCE OF COMPARATORS IN EVERY CASE.

Petitioners contend that the Sixth Circuit's decision in this case is in conflict with decisions in other circuits regarding the application of the *McDonnell Douglas* test, and that the Sixth Circuit rigidly applies the *McDonnell Douglas* formula so that, if a plaintiff has no comparators he or she cannot set forth a case of discrimination. (Petition at 14.) This is simply not the case.

First, the court in this case did not require evidence of comparables for Petitioners to make a prima facie case. As specifically stated by the Sixth Circuit: "Plaintiffs presented no evidence of any comparables that could possibly raise an inference of racial motivation in the alleged retaliation, ***and*** they failed to present any direct evidence of a racial motivation for defendant's actions." (Petition at 5a.)

In addition, a brief review of recent case law in the Sixth Circuit shows that, like other circuits, the Sixth Circuit follows this Court's mandate in *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978), and applies the *McDonnell Douglas* criteria in a flexible manner.[2] A plaintiff can establish a prima facie case of discrimination through the use of a variety of direct or indirect evidence, comparators or statistics. The Sixth Circuit does not demand that a plaintiff meet one rigid test. The conflict between the circuits Petitioners allege does not exist.

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[2]The following cases demonstrate the flexible approach taken by the Sixth Circuit in establishing a prima facie case: *Crabbs v. Copperweld Tubing Products Co.*, 114 F.3d 85, 86 (6th Cir. 1997) (inferences of discrimination can be made in an ADEA discharge case from disparaging remarks where no comparables exist); *Woythal v. Tex-Tenn Corp.*, 112 F.3d 243, 246-247 (6th Cir. 1997) (comparators are not required in an ADEA discharge case where disparaging comments could establish an inference of discrimination); *EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 861 (6th Cir. 1997) (elements of prima facie case are not inflexible in Title VII racial retaliation case); *Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1224 (6th Cir. 1996) (comparables are an "alternative" to "replaced by" in a disparate treatment case, citing *Mitchell v. Toledo Hospital,* 964 F.2d 577, 582 (6th Cir. 1992).

III. THERE IS NO CONFLICT AMONG THE CIRCUITS IN THE APPLICATION OF THE *MCDONNELL DOUGLAS* FORMULA.

Petitioners' argument that the circuit courts are inconsistent in applying the *McDonnell Douglas* construct is without merit.

McDonnell Douglas v. Green established a general framework for establishing a prima facie case of discrimination which, if established, shifts the burden of production to defendants to state legitimate non-discriminatory reasons for its actions. *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248 (1981). If such burden is met by the defendant employer, plaintiff must then produce sufficient evidence to allow the finder of fact to reasonably reject the explanation. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510-511 (1993).

McDonnell Douglas was never intended to provide a rigid, mechanized or ritualistic method of establishing a prima facie case of discrimination. *Furnco Constr. Corp. v. Waters* 438 U.S. 567, 577 (1978). As noted by Justice Powell in *McDonnell Douglas*, "the facts necessarily will vary...and the specifications... of the prima facie proof required from respondent is not necessarily applicable in every respect to differing situations." *McDonnell Douglas*, 411 U.S. at 802 n. 13.

The Sixth Circuit has adopted the approach of varying the proof required depending on the facts. *Monette v. Electronic Data Systems Corp.* 90 F.3d 1173, 1185 n. 11 (6th Cir. 1996). As the numerous cases cited by Petitioners demonstrate, every circuit allows inferences of discrimination based upon varying evidence justifying such an inference. This was precisely the intent of *McDonnell Douglas.*

Discrimination can take a variety of forms. The *McDonnell Douglas* construct, both in its original form and as it has been applied by the Sixth Circuit and the other circuit courts, has the necessary flexibility to remain useful in the variety of discrimination cases.

IV. THIS §1981 ACTION IS AN INAPPROPRIATE VEHICLE FOR THE SUPREME COURT TO REVIEW THE *MCDONNELL DOUGLAS* FORMULA.

This §1981 case is an inappropriate vehicle through which to review the *McDonnell Douglas* framework for several reasons.

First, as this Court has already determined and Petitioners have already conceded, this is not a discharge or dismissal case (Petition 23a) but rather a §1981 claim of retaliation for enforcing contract rights. *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 303 (1994). Unlike Title VII claims, §1981 claims of this nature require both proof of a protected contract right and proof of a racial motive. (Petition at 17a.) The *McDonnell Douglas* test was established in a Title VII hiring case, and only applied to other statutory claims by analogy. (*See McDonnell Douglas*, 411 U.S. 792.) Thus, even if the circuit courts were in conflict with respect to the application of the *McDonnell Douglas* formula in discharge cases, this is not an appropriate vehicle through which to resolve that conflict.

Second, in the wake of *Patterson* and the 1991 Civil Rights Act, it is particularly inappropriate to establish precedent regarding discriminatory discharges and the *McDonnell Douglas* test based upon a §1981 case. The combination of *Patterson* and the 1991 Civil Rights Act has relegated §1981 to a seldom-used statute. In *Patterson*, this Court

narrowed the scope of discriminatory contract actions under §1981 by holding that it does not apply to discrimination in terms, conditions, and termination of employment, but rather only forbids discrimination in the formation of contracts and enforcement of contract rights. *Id.*

The 1991 Civil Rights Act amended Title VII to make compensatory and punitive damages available in claims of intentional discrimination. 42 U.S.C. §1981(a)-(b). Prior to these amendments, a plaintiff could obtain only back pay and equitable relief under Title VII, but could obtain compensatory and punitive damages under §1981. The result of *Patterson* and the 1991 Civil Rights Act has been, practically speaking, the death of §1981 claims. There is simply no reason to bring a claim of discriminatory discharge under §1981 rather than under Title VII as amended by the Civil Rights Act of 1991. Consequently, given that §1981 has become anachronism, it is an inappropriate vehicle through which to establish precedent.

V. THE SIXTH CIRCUIT DID NOT "FUNDAMENTALLY MISINTERPRET" THE ANTI-RETALIATION PROVISIONS OF §1981.

Petitioners state that the "court of appeals held that petitioners' claim under §1981 must fail because they allegedly failed to identify a specific contract provision that they enforced when they successfully grieved the first disciplinary action against them. App. 3a-5a." (Petition at 29.) Petitioners argue that this was an incorrect statement of law, and that the Sixth Circuit misinterpreted the protection provided by §1981 against retaliation for seeking to enforce contractual rights free of discrimination. This is simply incorrect.

The issue raised by Petitioners is governed more by the Federal Rules of Civil Procedure than §1981. This case proceeded for nine years without Petitioners identifying the theory of recovery upon which they were basing their case. (Petition at 23a.) It was not until oral argument on the summary judgment motion granted by the district court on May 25, 1995 that Petitioners for the first time stated that the contractual right that they were enforcing was their contractual right to grieve differences with their employer that arise out of the collective bargaining agreement. As the district court cogently stated (Petition at 23a), and the Sixth Circuit specifically agreed (Petition at 4a):

> This case is now nine years old. Plaintiffs never pleaded nor alleged nor even mentioned in passing this theory of recovery when the case was before the Court initially. It was also not argued before the Sixth Circuit and was not even raised in plaintiffs' opposition to defendant's motion for summary judgment. There comes a time in the life of a case when a litigant must settle on a theory or theories of recovery and stick to it; that is a primary tenet of the notice pleading theory of the Civil Rules. Defendant first received notice of this theory of recovery at oral argument on defendant's motion for summary judgment, nine years after the inception of this case. Defendant would appear entitled to summary judgment on this claim on this basis alone.

(Petition at 23a-24a.)

Petitioners appear to have confused the burdens placed upon non-movants when opposing motions to dismiss and motions for summary judgment. On a motion to dismiss, a court must accept the allegations stated in the complaint as true, *Hishon v. King & Spalding*, 467 U.S. 69 (1984), must view the complaint in a light most favorable to the plaintiffs, *Scheuer v. Rhodes*, 416 U.S. 232 (1974), and may only grant a motion to dismiss if it is demonstrated that the plaintiff can prove no set of facts that would entitle it to relief. *Conley v. Gibson*, 355 U.S. 41 (1957).

Summary judgment, however, may be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the moving party has met its burden under Federal Rule of Civil Procedure 56(e), the burden shifts to the non-moving party who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (*quoting* Fed. R. Civ. P. 56(e)).

In the instant case, the contractual provision that Petitioners sought to enforce is an essential fact that Petitioners were required to identify in response to a summary judgment motion. They did not do so in written responses to Roadway's summary judgment motion, but during oral argument more than nine years after this case was filed identified several theories with some vacillation. They are now attempting to disguise this failure by arguing that §1981 does not require identification of a specific contract right. That is not the issue that was addressed by the district court or by the Sixth Circuit, and it is not an issue that should be addressed by this Court.

VI. THE PETITION FOR A WRIT OF CERTIORARI CONTAINS SEVERAL MISSTATEMENTS OF FACT.

Pursuant to the Supreme Court Rule 15.2., Respondent is compelled to bring to this Court's attention perceived misstatements of fact contained in Petitioners' Petition. First, Petitioners state that "[i]t is also undisputed that one of the grounds for the successful grievance was that discipline was being carried out in a racially discriminatory fashion." (Petition at 29.) This is not true. The district court ruled that any evidence regarding the committee's reasons for reversing the suspensions was inadmissible. (R. 120, R. 172.)[3] Any evidence

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[3]This ruling was first made by the United States Magistrate (R. 120: Order of Magistrate), and was later affirmed by the district court (R. 172: Memorandum and Order Affirming Magistrate's Order). At trial, a proffer of such evidence was made, but appellants never raised the issue of its admissibility on appeal, and cannot now raise it.

The reasoning for this ruling is that the committee at issue is a quasi-judicial entity whose members are entitled to the same degree of protection against inquiry into their decision-making processes as are arbitrators. *Lewis v. NLRB*, 779 F.2d 12, 13 (6th Cir. 1985) ("the practice of calling a member of a quasi-judicial body to explain or to otherwise embellish its decision is not permitted").

regarding the motivation behind the committee's reversal of appellants' suspensions is inadmissible.

Second, the Petitioners maintain that they were not notified that their failure to attend their hearings could result in their discharge. (Petition at 12.) However, the district court's Findings of Fact issued after its trial on Petitioners' identical Title VII claims specifically include the following:

> 21. On September 26, 1986, Toney informed Davison that Davison should attend the hearing because he had been given a direct order to do so and that Davison could be discharged if he did not attend the hearing....
>
> * * *
>
> 27. After discussing this matter with Toney, Toney informed Rivers that failure to attend the hearing could result in discharge.

(Petition at 50a-51a.) Therefore, Petitioners' statement that they were not notified that failure to attend their hearings could result in discharge is erroneous.

Third, Petitioners argue that Sedelbauer, the white employee who was discharged on the same day as were the Petitioners, was not comparable to Petitioners because he did not attend the

disciplinary hearing at all, while Petitioners did but left before the hearings were concluded. The Sixth Circuit, on the other hand, stated that "[i]t is undisputed that the only white mechanic who received notice of the second disciplinary hearing and who failed to attend was discharged along with Plaintiffs." (Petition at 5a.) The Sixth Circuit further held that Petitioners "were not present during the proceedings." (Petition at 2a.) Petitioners walking into the hearing room and leaving as soon as the hearings began and Sedelbauer's failure to enter the hearing room at all is a distinction without a difference. The Sixth Circuit correctly viewed Petitioners as being in the same situation as was Sedelbauer: they were notified of the hearings and failed to attend. That Petitioners may have arrived at their hearings, but left when they began was clearly inapposite to the Sixth Circuit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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